Supreme Court, U.S.
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No. 92-1152

In The

Supreme Court of the United States

October Term, 1992

WESTERN GAS RESOURCES, INC., SUCCESSOR IN INTEREST TO WESTERN GAS PROCESSORS, LTD.,

Petitioner,

v.

ROBERT E. HANSON, TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA,

Respondent.

Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in accordance with the due process clause, the North Dakota Tax Commissioner and the North Dakota Supreme Court properly interpreted the North Dakota oil extraction tax statute, N.D.C.C. § 57-51.1-01(3), as including field condensate in the definition of the term oil.

LIST OF PARTIES

Petitioner (Plaintiff-Appellant):

Western Gas Resources, Inc. is the Successor in Interest to Western Gas Processors, Ltd.

Western Gas Resources, Inc. has no parent company or non-wholly owned subsidiaries.

Respondent (Defendant-Appellee):

M. K. Heidi Heitkamp, Tax Commissioner of the State of North Dakota was succeeded in office through election by Robert E. Hanson. M. K. Heidi Heitkamp is now the duly elected Attorney General of North Dakota. The petition in this case was filed before Robert E. Hanson succeeded M. K. Heidi Heitkamp as Tax Commissioner. Robert E. Hanson's name should be substituted as provided under Supreme Court Rule 35.3.

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STATEMENT OF THE CASE

The statement of facts is well articulated by the North Dakota Supreme Court in the opinion below:

> Section 57-51.1-02, N.D.C.C., imposes an "'oil extraction tax' [OET], upon the activity in this state of extracting oil from the earth." For purposes of the OET, Section 57-51.1-01(3) defines "oil as petroleum, crude oil, mineral oil, casinghead gasoline, and all liquid hydrocarbons that are recovered from gas on the lease incidental to the production of the gas." The principal issue in this appeal is whether "field

condensate" is "oil" as defined by Section 57-51.1-01(3), N.D.C.C. Our analysis of this issue requires a description of "field condensate" and how Western recovers "field condensate" from natural gas.

Western is a gas processing company which owns and operates a natural gas gathering system and a natural gas processing facility in Billings County. Western purchases natural gas from various oil and gas producers and moves the gas through its gathering system to its processing facility at the Teddy Roosevelt Gas Plant [TR Plant]. At the well sites, the producers pump a mixture into oil, gas, and water from wells and separate the mixture into oil, gas, and water phases with a separator or heater treater. The producers dispose of the water, retain the oil, and pipe the gas stream in a vapor form to a "custody transfer meter" where custody and ownership is transferred to Western for movement through its gathering system to its processing facility at the TR Plant.

As the gas stream moves through Western's gathering system, changes in pressure and temperature cause liquid hydrocarbons to condense in the pipeline. The liquid hydrocarbons are called "drips" or "field condensate" and are collected and stored in underground tanks called "drip locations." In addition to the "drip locations," Western also recovers field condensate at field compressor stations, where the gas is compressed in three separate stages to facilitate its movement to the TR Plant. Western sells all the "field condensate" at a crude oil price and puts it in a crude oil pipeline.

. . . .

> On October 18, 1985, the Commissioner assessed an OET against Western for field . . . condensate recovered from January 1981 through December 1983. . . . Western objected to the assessment for field condensate, contending that field condensate was produced after the custody transfer meter and was therefore not recovered "on the lease" as required by the definition of "oil" in Section 57-51.1-01(3), N.D.C.C.
>
> An administrative hearing officer determined that field condensate was "oil" under Section 57-51.1-01(3), N.D.C.C. The hearing officer construed "all liquid hydrocarbons that are recovered form gas on the lease" to mean liquid hydrocarbons recovered in Western's gathering system before the inlet receiver at the TR Plant. The hearing officer recommended that Western be assessed an OET of $129,483.71. The Commissioner substantially adopted the hearing officer's findings of fact, conclusions of law, and recommendation. However, under Section 57-51-10, N.D.C.C., the Commissioner found good cause for waiving one hundred percent of the penalty and twenty percent of the interest on the OET. The Commissioner thus ordered Western to pay an OET of $129,483.71 plus eighty percent of the interest. The district court affirmed the Commissioner's decision, and Western appealed.

489 N.W.2d 870-871 (Pet. App. A-2 to A-3).

The North Dakota Supreme Court affirmed the district court and specifically found that Western's due process rights were not violated. The opinion below concluded that "[s]ection 57-51.1-01(3), N.D.C.C., when considered in light of the clear legislative intent to tax

hydrocarbons recovered before processing at a gas plant, provides adequate notice of the meaning of 'on the lease.' " 489 N.W.2d 873, 874 (Pet. App. A-8 to A-10)

SUMMARY OF THE ARGUMENT

The policy of this Court with respect to when it grants review was expressed in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1202 (1989), by quoting the following from *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 922 (1988): "The decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition."

Since the opinion below does not conflict with any state or federal court decision and since there is no important question of federal law which should be reviewed, this Court should not commit its scarce judicial resources to this case involving an administrative interpretation of state law.

ARGUMENT

REASONS FOR DENYING THE WRIT

CONSIDERATIONS UNDER SUPREME COURT RULE 10

I. THE OPINION BELOW DOES NOT CONFLICT WITH ANY STATE OR FEDERAL COURT DECISION.

There is no state or federal court decision which conflicts with the opinion below. The opinion below is limited to a review of an administrative interpretation of an ambiguous

state statute. The reviewing court examined the extrinsic aids used to formulate the administrative interpretation of the statutory meaning and concluded that the administrative interpretation was supported by a preponderance of the evidence and that a reasoning mind could reasonably reach the same conclusion. 489 N.W.2d 872-874 (Pet. App. A-4 to A-9). Therefore, there is no reason to grant the petition under Supreme Court Rule 10.1(b).

II. THE OPINION BELOW DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THE SUPREME COURT.

The Due Process Clause prohibition against excessive statutory vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Rose v. Locke*, 423 U.S. 48, 49 (1975). "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Id.* 50. Further, a statute is not unconstitutionally vague because it is necessary to consult other sources to interpret the statute. *Id.*

The North Dakota Supreme Court recognized this standard in *State v. Schwalk*, 430 N.W.2d 317, 320 (N.D. 1988), and applied it in the opinion below. 489 N.W.2d 873 (Pet.App. A-7 to A-8). Based upon the findings in this case, condensate can be considered petroleum, crude oil, or casinghead gasoline. (Pet. App. E-1 to E-28). These items are specifically included in the definition of oil under N.D.C.C. § 57-51.1-01(3). Thus, the statute cannot be unconstitutionally vague as applied to the condensate in this case.

Further, the statutory provisions relating to tax liability indicate that purchasers, such as Western, are liable for the oil extraction tax. *See* N.D.C.C. § 57-51.1-05. Therefore, reasonable persons in the same situation as Western would know that condensate is subject to the oil extraction tax. The statute in question is not unconstitutionally vague and there is no important question of federal law which should be reviewed under Supreme Court Rule 10.1(c).

CONCLUSION

For the reasons stated in this brief, the petition should be denied.

Dated January 28, 1993.

Respectfully submitted,

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